

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
August 18, 2005 Session

IN RE LAMONT B., II

**Appeal from the Juvenile Court for Davidson County
No. 2219-68383 Alan Calhoun, Referee**

No. M2004-02027-COA-R3-JV - Filed on June 23, 2006

This case concerns an initial custody determination of a four-year-old child. The child's parents ended their relationship before he was born. The child's mother was his sole caregiver during the first four months of his life, then the child's parents shared parenting responsibilities equally for the next eighteen months. The father eventually filed a petition in the Davidson County Juvenile Court seeking to be designated as the child's primary residential parent. Following a bench trial, the juvenile court designated the father to be the child's primary residential parent after finding him to be comparatively more fit. The mother has appealed. We affirm the juvenile court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

WILLIAM C. KOCH, JR., P.J., M.S., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

Yvette Y. Cain, Nashville, Tennessee, for the appellant, Veronica W.

Jeffrey Spark, Nashville, Tennessee, for the appellee, Laurice B.

Robert M. Robinson, Nashville, Tennessee, Guardian ad litem, for Lamont B., II.

OPINION

I.

Lamont B.¹ was born out of wedlock on May 11, 2002 to Veronica W. and Laurice B. The parents' relationship ended soon after Veronica W. became pregnant, and one month after Lamont B. was born, Veronica W. married Roderick W. Lamont B. spent his first four months living with his mother, her husband, and her six other children, all of whom were fathered by different men.

¹This court customarily identifies the parties using their initials in termination cases. We are departing from this practice in this case because of the similarity of the parties' initials. Accordingly, we will identify the parties in this case using their given name and the first letter of their surname.

Laurice B. visited Lamont B. frequently and took an interest in his upbringing. Because Laurice B. was not named on his son's birth certificate, he filed a petition to establish parentage on May 23, 2002 in the Davidson County Juvenile Court. On August 8, 2002, after DNA testing confirmed that Laurice B. was Lamont B.'s biological father, the juvenile court entered an order declaring that Laurice B. was Lamont B.'s biological and legal father. Despite a finding of parentage, the court reserved the issues of custody, support, and visitation.

From August 2002 to June 2003, the parties arranged for Laurice B. to care for Lamont B. during every other weekend and various times during the week. In June 2003, the parties began spending equal amounts of time with their son. Veronica W. juggled a strenuous schedule during this period, working a full-time job and attending classes full-time at Tennessee State University. Whenever she had custody of Lamont B., she would take him to daycare at 4:30 a.m and pick him up in the evening.

On September 19, 2003, Laurice B. filed a petition in the juvenile court seeking to be designated as Lamont B.'s primary residential parent. He alleged that Veronica W. was denying him time with Lamont B. He also alleged that allowing Lamont B. to remain in his mother's custody exposed him to a substantial risk of harm because of her criminal history involving drugs and her husband's criminal history involving assault, domestic assault, and other felonies and misdemeanors. Laurice B. also alleged that Veronica W. was incapable of adequately caring for Lamont B. because she had six other children to care for. Finally, Laurice B. alleged that he was a fit and proper person to be the custodial parent and that awarding him custody of Lamont B. was in the child's best interests. Veronica W. filed a counter-petition, seeking custody of Lamont B. and child support.²

At a show cause hearing held on October 2, 2003, the juvenile court concluded that the evidence did not establish that Lamont B. was in immediate threat of harm while in Veronica W.'s custody. The court allowed Veronica W. to retain custody of Lamont B. and granted Laurice B. extended and overnight visitation from 5:00 p.m. every Friday until Monday at 8:00 a.m. On October 20, 2003, the Court referred Lamont B. to the Community Services Agency/Caring for Children ("CSA/CFC") to conduct home studies on both parties and to evaluate Roderick W.'s mental health. The court also enjoined Roderick W. from driving an automobile with Lamont B. inside because he did not have a valid driver's license.

In November 2003, CSA/CFC assessed Veronica W. and Roderick W.'s home, as well as Laurice B.'s home. In its January 2004 report, CSA/CFC concluded that Veronica W. and Roderick W. struggled with financial difficulties. Although Veronica W. worked a full-time job in addition to attending classes, Roderick W. was unable to work because of a psychotic disorder for which he was receiving treatment. Their household income barely covered their monthly expenses, and Veronica W. had accumulated a number of delinquent credit card bills. CSA/CFC also noted that only one of the bathrooms in Veronica W.'s and Roderick W.'s house was in working order and that

²Tennessee Child Support Services represented Veronica W. in her effort to obtain child support from Laurice B. When Veronica W. retained counsel, Tennessee Child Support Services non-suited the case.

the other bathroom was in need of repairs that Veronica W. and Roderick W. could not afford. CSA/CFC arranged to cover the costs for plumbing repairs to the second bathroom.

CSA/CFC's assessment of Laurice B.'s home reported that Laurice B. lived with his fiancée. He had a daughter from another relationship who lived with him for fifteen days of each month. He worked full-time, and his household income well exceeded his monthly expenses. Neither he nor his fiancée suffered from any medical problems. While Laurice B. had been found guilty of theft in either 1993 or 1994, his fiancée had no criminal record.

The juvenile court conducted custody hearings on the parties' petitions on May 10 and 14, 2004. On June 3, 2004, the court issued a lengthy order and opinion comparing the fitness of both Veronica W. and Laurice B. to be Lamont B.'s primary residential parent. The court concluded that Laurice B. was comparatively more fit and, therefore designated him as Lamont B.'s primary residential parent. The court also granted Veronica W. visitation rights. Veronica W. has appealed.

II.

THE DESIGNATION OF LAURICE B. AS LAMONT B.'S PRIMARY RESIDENTIAL PARENT

Veronica W. takes issue with the juvenile court's decision to designate Laurice B. as Lamont B.'s primary residential parent. She argues that the evidence weighs in favor of designating her as the primary residential parent and asserts that the juvenile court improperly weighed the evidence, abused its discretion, and that it made an arbitrary and capricious decision without regard to Lamont B.'s best interests. We have determined that the juvenile court did not err by designating Laurice B. as the primary residential parent of Lamont B.

A.

Custody and visitation arrangements are among the most important decisions confronting a trial court in a divorce case. *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001). Courts must strive to devise custody arrangements that promote the development of the children's relationship with both parents and interfere as little as possible with post-divorce family decision-making. *Aaby v. Strange*, 924 S.W.2d 623, 629 (Tenn. 1996); *Taylor v. Taylor*, 849 S.W.2d 319, 331-32 (Tenn. 1993). The needs of the children are paramount, while the desires of the parents are secondary. *Lentz v. Lentz*, 717 S.W.2d 876, 877 (Tenn. 1986). Custody should never be used to punish or reward the parents, *Turner v. Turner*, 919 S.W.2d 340, 346 (Tenn. Ct. App. 1995); *Long v. Long*, 488 S.W.2d 729, 733 (Tenn. Ct. App. 1972), but rather should promote the children's best interests by placing them in an environment that will best serve their physical and emotional needs. *Luke v. Luke*, 651 S.W.2d 219, 221 (Tenn. 1983).

There are no hard and fast rules for determining which custody and visitation arrangement will best serve a child's needs. *Taylor v. Taylor*, 849 S.W.2d at 327; *Dantzler v. Dantzler*, 665 S.W.2d 385, 387 (Tenn. Ct. App. 1983). The inquiry is factually driven and requires the courts to carefully weigh numerous considerations. *Nichols v. Nichols*, 792 S.W.2d 713, 716 (Tenn. 1990) (*overruled on other grounds by Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996)); *Rogero v. Pitt*, 759

S.W.2d 109, 112 (Tenn.1988) (*overruled on other grounds by Aaby v. Strange*, 924 S.W.2d 623 (Tenn. 1996)). The Tennessee General Assembly and the courts have identified the factors that trial courts should consider. Tenn. Code Ann. § 36-6-106(a) (2005); *Bah v. Bah*, 668 S.W.2d 663, 666 (Tenn. Ct. App.1983).

Courts customarily devise initial custody and visitation arrangements by engaging in a comparative fitness analysis that requires them to determine which of the available custodians is comparatively more fit than the other. *In re Parsons*, 914 S.W.2d 889, 893 (Tenn. Ct. App.1995); *Bah v. Bah*, 668 S.W.2d at 666. This “comparative fitness” analysis does not measure the parents against the standard of perfection because the courts are pragmatic enough to understand that perfection in marriage and parenting is as evanescent as it is in life’s other pursuits. *Earls v. Earls*, 42 S.W.3d 877, 885 (Tenn. Ct. App. 2000); *Rice v. Rice*, 983 S.W.2d 680, 682-83 (Tenn. Ct. App.1998). Rather, the analysis requires the courts to determine which of the parents, in light of their present circumstances, is comparatively more fit to assume and discharge the responsibilities of being a custodial parent.

Custody and visitation decisions often hinge on subtle factors, including the parents’ demeanor and credibility during the divorce proceedings themselves. *Adelsperger v. Adelsperger*, 970 S.W.2d 482, 485 (Tenn. Ct. App.1997). Accordingly, appellate courts are reluctant to second-guess a lower court’s decisions. Courts must be able to exercise broad discretion in these matters, Tenn. Code Ann. § 36-6-101(a)(2) (2005), but they still must base their decisions on the proof and upon the appropriate application of the relevant principles of law. *D v. K*, 917 S.W.2d 682, 685 (Tenn. Ct. App.1995). Thus, we review these decisions de novo on the record with a presumption that the lower court’s findings of fact are correct unless the evidence preponderates otherwise. *Nichols v. Nichols*, 792 S.W.2d at 716; *Doles v. Doles*, 848 S.W.2d 656, 661 (Tenn. Ct. App. 1992).

Courts necessarily have broad discretion to fashion custody and visitation arrangements that best suit the unique circumstances of each case. *Parker v. Parker*, 986 S.W.2d 557, 563 (Tenn. 1999); *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988); *Helson v. Cyrus*, 989 S.W.2d 704, 707 (Tenn. Ct. App. 1998). It is not our role to “tweak [these decisions] . . . in the hopes of achieving a more reasonable result than the trial court.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 88 (Tenn. 2001). A lower court’s decision regarding custody or visitation should be set aside only when it “falls outside the spectrum of rulings that might reasonably result from an application of the correct legal standards to the evidence found in the record.” *Eldridge v. Eldridge*, 42 S.W.3d at 88.

B.

The juvenile court found that both Laurice B. and Veronica W. love Lamont B. and that each of them has emotional ties with the child. The court also noted that both parties had provided Lamont B. with food, clothing, and other necessities. Even though the court commended Veronica W. for her work history and her efforts to pursue a college education, it concluded that Laurice B. was in a better financial position than Veronica W. and that placing Lamont B. in his father’s custody would decrease the amount of time that the child would be in daycare.

The juvenile court noted that while considerations of continuity and stability weighed in Veronica W.'s favor, it was concerned about Veronica W.'s drug-related criminal activity when the child was born. In light of the six other children by different fathers that Veronica W. was caring for, as well as the character and fitness of Roderick W., the court concluded that Lamont B. would have a more stable home environment if he lived with Laurice B. Based on these findings, the court concluded that Laurice B. was comparatively more fit than Veronica W. to be Lamont B.'s primary residential parent.

After carefully reviewing the record, we have determined that the preponderance of the evidence does not weigh against the juvenile court's designation of Laurice B. as Lamont B.'s primary residential parent. We commend each of these parents for their devotion to Lamont B. and their efforts to provide for him. Although Veronica W. was Lamont B.'s primary provider during the first months of his life, both parents have played an equal and active role in Lamont B.'s life since he was four months old. However, the evidence supports the juvenile court's conclusions that Laurice B. is comparatively more fit to be Lamont B.'s primary residential parent and that placing Lamont B. in Laurice B.'s custody is in the child's best interests. Accordingly, we decline to find that the trial court erred by designating Laurice B. as Lamont B.'s primary residential parent.

III.

LAURICE B.'S REQUEST FOR ATTORNEY'S FEES

Laurice B. asserts that the juvenile court erred by failing to award him attorney's fees. He points to Tenn. Code Ann. § 36-5-103(c) (2005) which authorizes trial courts to award attorney's fees to successful litigants "in regard to any suit or action concerning the adjudication of the custody or the change of custody of any child" This provision does not limit recovery of attorney's fees to divorcing spouses who are parents of the child, but also includes "other persons to whom custody of the child, or children, is awarded." Tenn. Code Ann. § 36-5-103(c) (2005). *Stephenson v. West*, No. W1998-00668-COA-R3-CV, 2000 WL 52899, at *9 (Tenn. Ct. App. Jan. 13, 2000) (No Tenn. R. App. P. 11 application filed).

In the absence of a contract or statute, the decision to award attorney's fees and the amount of attorney's fees to be awarded are within the discretion of the trial judge. *Aaron v. Aaron*, 909 S.W.2d 408, 411 (Tenn. 1995); *Albright v. Mercer*, 945 S.W.2d 749, 751 (Tenn. Ct. App. 1996); *Airline Constr., Inc. v. Barr*, 807 S.W.2d 247, 270 (Tenn. Ct. App. 1990). The reasonableness of a particular attorney's fee depends on the facts of the case. *Alexander v. Inman*, 903 S.W.2d 686, 695 (Tenn. Ct. App. 1995). Accordingly, we review a trial court's award of attorney's fees using the "abuse of discretion" standard of review. *Knox County ex rel. Schumpert v. Union Livestock Yard, Inc.*, 59 S.W.3d 158, 166 (Tenn. Ct. App. 2001); *Fell v. Rambo*, 36 S.W.3d 837, 853 (Tenn. Ct. App. 2000).

We have concluded that the juvenile court did not err in this case by requiring both parties to pay their own attorney's fees. These decisions are discretionary. In light of Veronica W.'s financial difficulties, we decline to hold that the trial court's decision lacks any basis in law and fact.

IV.

We affirm the order designating Laurice B. as the primary residential parent of Lamont B. and remand this case to the juvenile court for whatever further proceedings consistent with this opinion may be required. We tax the costs of this appeal in equal proportions to Veronica W. and her surety and to Laurice B. for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., P.J., M.S.